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The Privacy of Death: An Emergent Jurisprudence and Legal Rebuke to Media Exploitation and a Voyeuristic Culture

Clay Calvert

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I. INTRODUCTION

Legal scholars are fretfully predicting the possible death of privacy—in particular, informational privacy—in coming years.[1] This thesis is even found in the subtitle of a recent book,[2] and there certainly is no doubt that privacy is increasingly sacrificed in our voyeuristic, tabloid-journalism culture.[3] While legal scholars have focused on the death of privacy, a nascent, inchoate, and sometimes politically-charged jurisprudence has

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1. *See* A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1543 (2000) ("Given the rapid pace at which privacy-destroying technologies are being invented and deployed, a legal response must come soon, or it will indeed be too late."); *see also* Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 845 (2002) ("[I]nformational asymmetry, unequal bargaining power, and collective action problems [constitute] phenomena [that] stack the deck against those who would preserve the private sphere, and in favor of those who benefit from its erosion. Without some structural changes to restore the balance, the erosion of privacy may be a foregone conclusion.").

2. SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY (2001).

3. *See* Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721 (2004) (examining the fundamental tension between maintaining privacy and accelerating voyeurism); *see also* ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY xiii (1995) (stating that "more and more of our privacy is stripped away" despite the complaints of many people "that the press can invade lives with impunity").

emerged: *the privacy of death*.[4]

It is a jurisprudence that focuses not simply on the privacy rights of the dead, but also on the privacy rights of the deceased's immediate relatives. These rights include their ability to control the publication of postmortem images and the dying words of their departed loved ones. As a result, the traditional notion of informational privacy,[5] "an *individual's ability* to control what others know about him,"[6] has been transformed into a *relative's ability* to control what others see about the death of his or her late family members.[7]

Autopsy photographs, death-scene images of suicides, pictures of the dead in both open and closed caskets, and tapes and transcripts of emergency telephone calls that contain dying words, are frequently found at the center of privacy-of-death controversies.[8] The issue frequently boils down to how to strike a proper legal balance between the public's unenumerated right[9] to newsworthy information[10] about the dead, and

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4. See George J. Annas, *Family Privacy and Death—Antigone, War, and Medical Research*, NEW ENG. J. MED., Feb. 3, 2005, at 501 ("Family privacy concerning a family member who has died is at the forefront of a continuing political dispute in the United States.").

5. Informational privacy is to be distinguished from autonomy privacy. *See* Dorothy J. Glancy, *Privacy on the Open Road*, 30 OHIO N.U. L. REV. 295, 321 (2004) ("[M]odern legal analysis conventionally divides privacy interests into two categories: autonomy privacy (or decisional privacy) interests and information privacy (or data privacy) interests.").

6. Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After Lawrence v. Texas*, 54 DEPAUL L. REV. 671, 677 (2005) (emphasis added); *see* Paul M. Schwartz, *German and U.S. Telecommunications Privacy Law: Legal Regulation of Domestic Law Enforcement Surveillance*, 54 HASTINGS L.J. 751, 798 (2003) ("[T]he right of information privacy has often been seen as an individual right of control.").

7. "The range of privacy issues concerning familial relations is immense." Nancy Levit, *Family Privacy Bibliography: Family Privacy*, 17 J. AM. ACAD. MATRIMONIAL L. 183, 183 (2001). This comment, however, concentrates on one specific aspect of relational privacy, namely the ability of relatives of the dead to control and punish the disclosure and publication of death images and dying words of their deceased family members.

8. *Infra* notes 12-198 (discussing the *Favish* opinion); *see, e.g.*, Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004) (involving the dispute over death scene images of a suicide).

9. Although not found in either the U.S. Constitution or in the amendments to it, journalists often invoke "the public's right to know" when it comes to publishing information. For instance, the Code of Ethics of the Society of Professional Journalists provides that "[j]ournalists should be free of [an] obligation to any interest other than *the public's right to know*." Code of Ethics, Society of Professional Journalists, http://www.spj.org/ethics.pdf (last visited Sept. 18, 2005) (emphasis added). *See generally* Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 141–43 (2003) (discussing the First Amendment and the implied right to know).

10. Newsworthiness is particularly relevant here; it provides a defense to tort causes of action based on public disclosure of private facts. It may also be conceptualized as "subject to a three-part test involving the social value of the published facts, the depth of intrusion into ostensibly private affairs, and whether the person acceded voluntarily to a position of public

concerns for the family's privacy rights, emotional tranquility, solemn respect, and dignity.[11].

Today's growth in privacy-of-death jurisprudence is fueled in part by the United States Supreme Court's decision in *National Archives & Records Administration v. Favish*.[12] In *Favish*, the High Court recognized "the right of family members to direct and control disposition of the body of the deceased and to limit attempts to exploit pictures of the deceased family member's remains for public purposes."[13] Justice Anthony Kennedy wrote for a unanimous Court that "[f]amily members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."[14] The Court ultimately ruled in favor of the privacy interests of Vincent Foster's immediate relatives. Moreover, it rejected the request of attorney Allan Favish to present photographs that he believed might prove the fact of Foster's murder.[15]

The *Favish* opinion was jurisprudentially revolutionary because "the Court fully recognized for the first time that surviving family members enjoy a privacy interest that must be considered when analyzing the release of agency records."[16] While the case centered on the statutory construction of FOIA and government agency records, the reasoning of the nation's High Court was not nearly so limited. The Supreme Court expanded the scope of its decision by commenting that a "well-established cultural tradition acknowledging a family's control over the body and death images of the deceased has long been recognized *at common law*."[17] This means that the privacy-of-death jurisprudence arises from both statutory freedom-

notoriety." M.G. v. Time Warner, Inc., 107 Cal. Rptr. 2d 504, 511 (Ct. App. 2001).

11. *See, e.g.*, Providence Journal Co. v. Town of W. Warwick, No. 03-2697, 2004 R.I. Super. LEXIS 136, at *6-8 (R.I. Super. Ct. 2004) (stating that the court "cannot conceive of a greater affront to such *dignity* than permitting others to listen to the anguish that is embodied" in 911 emergency telephone calls made by the dying victims, and reasoning that "these communications are entitled to protection whether initiated by victims or family members to avoid a highly intrusive interference with the *legitimate privacy entitlement* these individuals should be afforded") (emphasis added).

12. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

13. *Id.* at 167.

14. *Id.* at 168.

15. *Id.* at 161. The facts surrounding Foster's death appear relatively settled. Five separate government investigations into Foster's death concluded that he committed suicide, however, Favish disputed these findings and found them untrustworthy.

16. Joseph Romero, *National Archives & Record Administration v. Favish: Protecting Against the Prying Eye, the Disbelievers, and the Curious*, 50 NAVAL L. REV. 70, 70 (2004).

17. *Favish*, 541 U.S. at 168 (emphasis added).

of-information laws and from judge-made common law. The Court gave the green light to judges across the country to recognize family members' privacy rights over the images of their dead loved ones beyond the narrow confines of FOIA access disputes. The *Favish* Court cited an 1895 New York Court of Appeals decision for the following proposition:

> [I]t is the right of the living, and not that of the dead, which is recognized. A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings, and to prevent a violation of their own rights in the character and memory of the deceased.[18]

The High Court's willingness to use a state court precedent that is more than 100 years old indicates its commitment to a privacy-of-death jurisprudence.

The aftermath of the *Favish* opinion brought a new wave of disputes concerning privacy rights over the information and images related to death.[19] For instance, in July 2004, Rhode Island Superior Court Judge Mark Pfieffer cited to *Favish* when he held that tapes of 911 emergency calls made by the dying victims of a fire that ripped through a West Warwick nightclub in 2003[20] could be suppressed under the state's Access to Public Records Act.[21] Judge Pfieffer wrote that "[t]hese communications are entitled to protection whether initiated by victims or family members to avoid a highly intrusive interference with the legitimate privacy entitlement these individuals should be afforded."[22] Important in this case was the judicial recognition of "the privacy interests and the dignity of the victims and their family members."[23] In other words, both the decedents and their living family members have privacy interests.

The year 2005 brought more high-profile decisions involving battles to suppress images and information about the dead from public disclosure

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18. *Id.* at 168–69 (quoting Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895)).

19. *See, e.g.*, Samuel A. Terilli & Sigman L. Splichal, *Public Access to Autopsy and Death-Scene Photographs: Relational Privacy, Public Records and Avoidable Collisions*, 10 COMM. L & POL'Y 313, 325 (2005) ("[T]here is no question that *Favish* will be significant and will affect the concerns raised by various parties and judges in a number of cases.").

20. *See generally* Michael Powell & Christopher Lee, *R.I. Nightclub Fire Kills 96*, WASH. POST, Feb. 22, 2003, at A01 (describing how "[a]t least 96 people burned to death" at the Station nightclub, in West Warwick, R.I., during a concert by Great White, a heavy metal band, when a pyrotechnics show started a fire that triggered "one of the worst such tragedies in the nation's history").

21. Providence Journal Co., 2004 R.I. Super. LEXIS 136, at *6.

22. *Id.* at *6–7.

23. *Id.* at *12.

or to punish individuals and entities that had previously published images.[24] The following cases from the first half of 2005 involved privacy concerns of the deceased versus the interests of the public:

• In June 2005, a complaint for multiple causes of action, including invasion of privacy[25] and intentional infliction of emotional distress,[26] was filed in federal district court in Oklahoma against the publisher of *Harper's* magazine. The action stemmed from a photograph the magazine published that captured a private, open-casket funeral of a National Guardsman killed while on duty in Iraq.[27] The complaint was filed by the deceased soldier's biological father and the administrator of the decedent's estate. The complaint alleged that the photograph was "emotional, sensational[,] and disturbing"[28] and that its publication took place to "reap recognition, sales, business[,] and profits"[29] for *Harper's* at the expense of plaintiffs' privacy rights and emotional tranquility.[30] Another brief filed in June 2005 stated, "[T]he First Amendment[31] does not shield the defendants from liability for the unlawful and unauthorized publication of photographs of Kyle Showler Brinlee's remains, nor does the First Amendment allow the Defendants to invade the privacy (rights) of the grieving family members."[32]

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24. *See infra* notes 26-56 (describing relevant disputes from 2005).

25. First Amended Complaint at 6–9, Showler v. Harper's Mag. Found., Case No. 05-CV-178-S (E.D. Okla. June 14, 2005) (setting forth the invasion of privacy cause of action). Although the amended complaint failed to specify by name which of the four privacy torts was being pled, a close reading of the complaint indicates that it was for the privacy tort of public disclosure of private facts; *see generally* JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS, AND THE MODERN MEDIA 181–90 (4th ed. 2004) (describing the tort of public disclosure of private facts).

26. *See generally* DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 204–06 (2005/2006 ed.) (providing an overview of the tort of the intentional infliction of emotional distress, including its basic elements).

27. First Amended Complaint at 4, Showler v. Harper's Mag. Found., No. 05-CV-178-S (E.D. Okla. June 14, 2005).

28. *Id.* at 6.

29. *Id.* at 7 ("In disregard for Plaintiffs' right of privacy, the photograph depicting Kyle's remains was published without Plaintiffs' consent so the Defendants would reap recognition, sales, business[,] and profits.").

30. *Id.*

31. U.S. CONST. amend. I (providing in relevant part that "Congress shall make no law . . . abridging the freedom of speech, or of *the press*.") (emphasis added). The Free Speech and Free Press Clauses have been incorporated through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

32. Plaintiffs' Brief in Support of Their Response and Objection to Defendant Harper's Magazine Foundation's and Peter Turnley's Motion to Dismiss for Failure to State a Claim for Which Relief can be Granted at 6, Showler v. Harper's Mag. Found., No. 05-CV-178-S (E.D. Okla. June 15, 2005).

• In May 2005, a Delaware court addressed the issue of whether the common law or statutory law of that state recognizes a privacy interest in the family of a deceased person, sufficient to prevent the public disclosure of autopsy and toxicology reports.[33] Rejecting the notion of such a common law right, the court found that "the overwhelming weight of authority holds that a claim for invasion of privacy cannot be brought by a decedent's family."[34] However, the court acknowledged that a very small minority of courts have held otherwise.[35]

• In April 2005, in response to a Freedom of Information Act request by journalism professor Ralph Begleiter,[36] the Pentagon publicly released hundreds of photographs "of flag-draped caskets bearing American soldiers killed in combat."[37] The Pentagon, however, "continues to refuse to allow journalists to photograph the arriving coffins independently"[38] at Dover Air Force Base in Delaware when soldiers' remains return from Iraq and Afghanistan. That ban, which began in 1991, ostensibly[39] is intended to protect the privacy rights of the families of deceased military personnel.[40]

• Also in April 2005, the Supreme Judicial Court of Maine, citing the *Favish* opinion, considered the privacy interests of decedents and their families in keeping the records of alleged sexual abuse by eighteen Roman Catholic priests private—a dispute that arose under Maine's Freedom of

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33. Lawson v. Meconi, 2005 Del. Ch. LEXIS 74 (Ct. of Chancery May 27, 2005).

34. *Id.* at *18.

35. *See id.* at *19–20 (discussing the Washington Supreme Court's recognition of a privacy interest held by the immediate relatives of a decedent in the autopsy records of their dead relatives in *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998)).

36. See Begleiter Professional Biography, http://www.udel.edu/communication/COMM418/begleite/beglhome/beglbio.htm (last visited Sept. 18, 2005) (stating that Begleiter is a former CNN world affairs correspondent who now is a professor at the University of Delaware).

37. John Hendren, *Photos of War Dead Released by Pentagon*, L.A. TIMES, Apr. 29, 2005, at A8.

38. *Id.*

39. Some claim the real intent of this ban has nothing to do with privacy but the White House "suppressing images of dead soldiers to avoid eroding public support for the conflict." Joe Garofoli & Matthew B. Stannard, *Flag-Draped Coffin Photos Released*, S.F. CHRON., Apr. 29, 2005, at A10.

40. Neil Henry, *Picture Power: The Image in Wartime and the Digital Age*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 481 (2005) ("Throughout the war and occupation, the administration prohibited journalists from taking photos of the dead, citing a desire to protect the privacy of family and loved ones."); *see* Ann Scott Tyson, *Hundreds of Photos of Caskets Released*, WASH. POST, Apr. 29, 2005, at A10 (stating that the ban was "first imposed in January 1991 during the Gulf War and continued by President Bush with the start of the Afghanistan war in October 2001" and quoting Col. Gary Keck, a Defense Department spokesman, for the proposition that the ban is intended to "ensure privacy and respect is given to the families who have lost their loved ones").

Access Act.[41] Observing that the last acts of alleged abuse happened two decades ago in 1983, the court held that "the passage of time has largely extinguished the residual privacy interests of the deceased priests, if any, and of their immediate family members."[42]

• In March 2005, New York's highest court held in *New York Times Company v. City of New York Fire Department*[43] that the dying words of callers made to 911 emergency operators on September 11, 2001 from the World Trade Center towers were protected from disclosure under a privacy exemption of the state's Freedom of Information Law (FOIL).[44] While acknowledging the *New York Times*' position that "the public has a legitimate interest in knowing how well or poorly the 911 system performed on that day,"[45] the appellate court held that the privacy interests against disclosure were "compelling"[46] and recognized "that surviving relatives have a legally protected privacy interest"[47] that trumped the public's right to know what the deceased said.[48] This echoes both the result and reasoning of another dying-words case more than a dozen years before where a federal court protected from disclosure under the federal FOIA law the dying words of the Challenger space shuttle crew members.[49] The court in that case noted that "[e]xposure to the voice of a beloved family member immediately prior to that family member's death is what would cause the Challenger families pain."[50]

Besides these cases, 2005 witnessed in very different contexts other legal disputes over photographs of the dead. For instance, an insurance

41. Blethen Me. Newspapers, Inc. v. Maine, 871 A.2d 523, 529 (Me. 2005).

42. *Id.* at 532.

43. N.Y. Times Co. v. City of N.Y. Fire Dep't, 829 N.E.2d 266 (N.Y. 2005).

44. *Id.* at 271 ("We conclude that the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.").

45. *Id.*

46. *Id.* at 270.

47. *Id.*

48. *But see* Jim Dwyer et al., *Vast Archive Yields New View of 9/11*, N.Y. TIMES, Aug. 13, 2005, at 1 ("[T]he city of New York [in August 2005] opened part of its archive of records from Sept. 11, releasing a digital avalanche of oral histories, dispatchers' tapes and phone logs so vast that they took up 23 compact discs."). Importantly, this material did "not include any of the calls from citizens to 911 that day." William Murphy, *Court Orders Release of Firefighters' Recordings*, NEWSDAY, Aug. 6, 2005, at A10.

49. *See* N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 782 F. Supp. 628, 633 (D. D.C. 1991) (stating that the Challenger space shuttle exploded in January 1986 shortly after its launch) ("The Court finds that the Challenger families' privacy interest in the tape in question outweighs the public interest such that release of the tape would constitute a clearly unwarranted invasion of the families' personal privacy.").

50. *Id.* at 631.

company contested the settlement of a lawsuit for intentional and negligent infliction of emotional distress, where the plaintiff alleged that after she delivered her two stillborn children "she was shown photographs of the dead twins"[51] and that "the hospital and a photo business posed and photographed the deceased children, and presented her with pictures printed with words of congratulations."[52]

Finally, autopsy photographs and the medical examiner's recordings of the late Terri Schiavo—a woman who died a controversial death in 2005 after a feeding tube was removed from her body[53]—were prevented from public release due to a 2001 Florida law[54] passed after the death of NASCAR driver Dale Earnhardt.[55] One legal scholar has observed that while Florida was "a state with open-records laws that have been regarded as a model for other states,"[56] including with regard to autopsy photos, "[t]he Earnhardt/Family Protection Act now allows release of such materials only by a judge's order."[57] Other states also limit by statute the public disclosure of autopsy photographs, while giving special rights of access and control to family members and the decedent's relatives.[58]

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51. *Hospital Allegedly Photographs Dead Babies*, TEXAS INS. L. & LITIG. ALERT, June 15, 2005, at 3.

52. *Id.*

53. *See generally* Manuel Roig-Franzia, *Long Legal Battle Over as Schiavo Dies*, WASH. POST, Apr. 1, 2005, at A1 (describing Schiavo's death and some of the ethical and legal issues raised by the debate about whether to remove her feeding tube).

54. *See* FLA. STAT. ANN § 406.135 (West 2002) (providing that "[a] photograph or video or audio recording of an autopsy in the custody of a medical examiner is confidential and exempt" from disclosure under Florida's open records laws unless a judge determines it should be released "upon a showing of good cause," a determination that is to take into account whether "such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form").

55. *See* Jill King Greenwood, *Terri Schiavo's Remains Cremated After Autopsy*, TAMPA TRIB., Apr. 3, 2005, at Metro 1 ("While the autopsy report will be made public, images and recordings are kept sealed under a 2001 law passed after the death of race car driver Dale Earnhardt.").

56. Martin E. Halstuk, *Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMMLAW CONSPECTUS 71, 94 (2003).

57. *Id.*

58. *See, e.g.*, GA. CODE ANN. § 45-16-27(d) (1981) (exempting from public disclosure, under Georgia's open records laws, autopsy photographs unless the photographs are for "law enforcement agencies and prosecutors for law enforcement purposes or, in closed criminal investigations, to medical schools, medical facilities, and physicians for medical purposes; to individuals who have secured a written release from the deceased's next of kin; or to the next of kin"); IND. CODE ANN. § 36-2-14-10 (2000) (providing that "a photograph, video recording, or audio recording of an autopsy in the custody of a medical examiner is declared confidential for

Autopsy photograph and recording statutes thus constitute a new and particular niche of the larger privacy-of-death jurisprudence discussed in this article.

Given the relative newness in the United States of the legal right of privacy,[59] "[t]he widespread discontent over conceptualizing privacy[,]"[60] and "the great difficulty in reaching a satisfying conception of privacy[,]"[61] today's ferment about the privacy rights of the decedent's relatives is not surprising.[62] But, given both the media's propensity for invasiveness and sensationalism with respect to death,[63] and the likelihood that cases, such as those described above, will arise in the future, close attention on this topic is warranted.[64] If, as philosopher Sissela Bok contends, "[t]here is no clear

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purposes of" Indiana's open records laws, but allowing a surviving spouse to view and copy such photographs and recordings, and adding that "[i]f there is no surviving spouse, the surviving parents shall have access to the records under this section. If there is no surviving spouse or parent, an adult child shall have access to the records."); IND. CODE ANN. § 16-39-7.1-4(a)–(b) (1993 & Supp. 2004) (providing a "good cause" exemption from the general rule against disclosure of autopsy photographs set forth in section 36-2-14-10 of the Indiana Code, and setting forth four specific factors that judges must consider in a good cause determination, including "the seriousness of the intrusion into the family's right to privacy"); S.C. CODE ANN. § 30-4-40(a)(18) (2004) (exempting from public disclosure "[p]hotographs, videos, and other visual images, and audio recordings of and related to the performance of an autopsy" but allowing, by direct reference to section 17-5-535 of the South Carolina Code of Laws, the parents of the deceased, surviving spouse, children, guardian, personal representative next of kin, and any other person given permission or authorization to view or possess the visual images by the personal representative of the deceased's estate).

59. *See* James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 29 (2003) ("Privacy law in the United States did not begin to develop until the middle of the twentieth century.").

60. Daniel J. Solove, *Conceptualizing Privacy*, 90 CAL. L. REV. 1087, 1089 (2002).

61. *Id.* at 1088.

62. Currently, other aspects of privacy are also in a stage of ferment and change, such as sexual privacy rights surrounding both same-sex marriage and consensual sexual conduct, with the U.S. Supreme Court sharply divided on the latter in 2003. *See* Lawrence v. Texas, 539 U.S. 558, 561, 564, 594–5 (2003) (striking down, in a six to three decision, a Texas anti-sodomy law, and including a blistering dissent by Justice Scalia criticizing, among other things, the Court's right-to-privacy jurisprudence).

63. As an illustration of the likelihood of this scenario in the context of death-scene images of suicides, Louisiana State University Professor Louis Alvin Day writes that "where suicides or suicide attempts are captured on videotape, a likely occurrence in today's electronic age, TV stations should use such footage with caution. Competitive pressures and the excitement of such dramatic footage can lead to a moral lapse on the part of some producers and news directors." LOUIS ALVIN DAY, ETHICS IN MEDIA COMMUNICATIONS: CASES AND CONTROVERSIES 144 (4th ed. 2003).

64. Questions about postmortem confidentiality and privacy were addressed in a 2001 law journal article, but that article concentrated only on medical records, and it was written several years before the *Favish* opinion and current lawsuits. Jessica Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 34 CONN. L. REV. 81, 83 (2001) (reviewing "the scope of confidentiality protections and exceptions [about medical information] for people who

line surrounding *private life* that can demarcate regions journalists ought not to explore[,]"[65] then it is not surprising that there is no clear line, either legally or ethically, surrounding *private death* that journalists must not cross.

Part II of this article explores the non-legal and extra-judicial forces at work that may be influencing, if not driving, the current spate of lawsuits and litigation related to the public disclosure of images and information about the dead.[66] Part II offers an understanding of the role that the news media may play in shaping the current and future contours of the law in this area. Part III attempts to distinguish the diverse ways in which litigation over images of the dead and their dying words may arise.[67] Additionally, Part III examines historical precedent, highlighting cases from the past that provide necessary background for understanding current disputes. This part also delves into both the factual underpinnings and judicial reasoning of the cases described in the introduction.

Finally, Part IV creates, proposes, and articulates a set of six factors for courts to apply when considering the privacy interests of the decedent's relatives.[68] These factors, some of which are distilled from the cases described in Part III, are applied in the context of civil lawsuits concerning the publication of images of the dead and in access-to-information disputes under states' open records laws. Part III argues that the law must, either by legislative or judicial fiat, recognize that the immediate relatives of the dead do possess a qualified, albeit not absolute, privacy right in preventing media exploitation of their late loved ones' words and images. The six factors articulated in Part IV should be used to determine when that qualified right has been outweighed by the public's right to know.

II. DEATH AND THE MEDIA: "IT'S INTERESTING WHEN PEOPLE DIE"[69]

The American television news media has continued to test, push, and

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have died" and analyzing "the type and extent of interests in maintaining confidentiality postmortem").

65. SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 252 (Vintage Books 1989) (emphasis added).

66. *See* discussion *infra* Part II.

67. *See* discussion *infra* Part III.

68. *See* discussion *infra* Part IV.

69. DON HENLEY, *Dirty Laundry, on* I CAN'T STAND STILL (Asylum 1982) (singing from the perspective of a jaded and unscrupulous television news anchorperson along the lines of the fictitious Ron Burgundy from the recent movie *Anchorman*) ("It's interesting when people die-[g]ive us dirty laundry"); *see* Richard Harrington, *The Princess of Rock Makes a Name for Herself*, WASH. POST, May 6, 2005, at T06 (describing Henley's song as an "'80s screed [that] scours both tabloid mentality and celebrity culture").

challenge the amorphous boundary that separates news from voyeurism in 2005.[70] Is the sensational and sometimes exploitive coverage of death and other tragedies by the media shaping the law when it comes to the publication of images of the dead? Perhaps, this dubious coverage coupled with the fact that, as the *New York Times* observed in May 2005, "American confidence in the news media is at an all-time low,"[71] will influence the emerging jurisprudence of the privacy of death. In addition, as images of death and the dead are transmitted and watched repeatedly on television and on the Internet, technology compounds, if not expedites this area of law.[72] This concern was on the minds of Florida legislators when they approved a bill that served familial privacy interests by substantially limiting the disclosure of autopsy photographs.[73]

An illustration of the media's seeming obsession with death was the wall-to-wall media spectacle of Terri Schiavo's passing in spring 2005,[74] and what can charitably be described as a televised pope deathwatch.[75]

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70. *See* Omar Jabara, *The Vast Wasteland of Television News*, DENV. POST, Apr. 3, 2005, at E03 ("There's a saying that the media can't tell us what to think but they can tell us what to think about. Are the things they have us thinking and talking about these days really news or just manufactured crises and constitutionally protected voyeurism?"). Further, it is not just in the United States that voyeurism and the media are increasingly linked. *See* Anne S. Y. Cheung, *Turning Victims into Defendants: A Study of Sex Scandals*, SINGAPORE J. LEGAL STUD., Dec. 2004, at 329 (describing a "culture of mass voyeurism of the private lives of others" in China and Taiwan).

71. Patrick D. Healy, *Believe It: The Media's Credibility Headache Gets Worse*, N.Y. TIMES, May 22, 2005, at 4.

72. Graphic videotapes of beheadings in Iraq have been posted on Web sites. *See* Clint Williams & Don Plummer, *Captors Behead American Hostage*, ATLANTA J.-CONST., Sept. 21, 2004, at 1A (describing how a videotape depicting the beheading of Eugene Armstrong of Hillsdale, Michigan, was "posted on an Internet Web site used by Islamic militants"); Joan Ryan, *Is This War, or Ghastly Reality TV?*, S.F. CHRON., May 13, 2004, at B1 ("[A]nother horrific image landed in our living rooms. Five masked captors are seen on video about to behead a 26-year-old American communications worker from Pennsylvania named Nick Berg. The full video, *available on the Internet*, shows the killer holding up Berg's head like a trophy.") (emphasis added).

73. A Florida appellate court, considering the constitutionality of this law, examined the legislative history behind it:

> The Legislature notes that the existence of the World Wide Web and the proliferation of personal computers throughout the world encourages and promotes the wide dissemination of photographs and video and audio recordings 24 hours a day and that widespread unauthorized dissemination of autopsy photographs and video and audio recordings would subject the immediate family of the deceased to continuous injury.

Campus Commc'ns, Inc. v. Earnhardt, 821 So. 2d 388, 393 (Fla. Dist. Ct. App. 2002).

74. *See* Leonard Pitts Jr., *Sometimes God Says No*, BALT. SUN, Apr. 3, 2005, at 5C ("Watching the increasingly naked desperation of the fight to keep Mrs. Schiavo alive came to feel intrusive and voyeuristic. You wanted to turn away, but there was no place you could go.").

75. Peter Johnson, *Succession is the Story Now*, USA TODAY, Apr. 4, 2005, at D4 ("Cable

Writing about the Schiavo coverage, media critic Howard Kurtz stated, "[d]oes anyone seriously believe Congress would have passed a law affecting only Schiavo had television not assaulted us with the endless loop of her in a hospital bed?"[76] Kurtz adds that:

> Schiavo's passing merged seamlessly into the next death watch as Pope John Paul II entered the hospital, triggering coverage so intense that a Fox News anchor, reacting to a producer's error, pronounced the pontiff dead more than 24 hours early. The passing of the pope, which touched millions around the world, was a huge story, but as the days wore on with little new to report, the constant stream of religious leaders and theologians became part of a round-the-clock canonization that had even some Catholics questioning whether enough was enough.[77]

Kurtz wasn't the only press commentator to notice the news media's increasing fascination with death and its exploitation of death for ratings. Columnist Frank Rich wrote in April 2005 in the *New York Times*:

> Mortality—the more graphic, the merrier—is the biggest thing going in America. Between Terri Schiavo and the pope, we've feasted on decomposing bodies for almost a solid month now. The carefully edited, three-year-old video loops of Ms. Schiavo may have been worthless as medical evidence but as necro-porn their ubiquity rivaled that of TV's top entertainment franchise, the all-forensics-all-the-time "CSI." To help us visualize the dying John Paul [II], another Fox star, Geraldo Rivera, brought on Dr. Michael Baden, the go-to cadaver expert from the JonBenet Ramsey, Chandra Levy and Laci Peterson mediathons, to contrast His Holiness's cortex with Ms. Schiavo's.[78]

The comments of sagacious media commentators like Kurtz and Rich add weight to the arguments made in this article.

Stories about ordinary people have also raised questions about the

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news went wall-to-wall all weekend with coverage of the pope's decline. Friday, Fox News reported the pope's death prematurely after a producer, monitoring Italian reports, shouted into an open microphone during anchor Shepard Smith's newscast. Smith apologized to viewers about 35 minutes later."); *see also* Michael Sappol, *Why the Dead Are a Killer Act*, L.A. TIMES, June 12, 2005, at M5 (commenting on the media's fascination with death today) ("Some critics have dismissed the wave of anatomical exhibitions as faddish sensationalism and voyeurism. But the spectacles are part of a larger cultural trend. Films, television shows and novels now regularly feature hyper-realistic depictions of dead and mutilated bodies, and often the interior of such bodies.").

76. Howard Kurtz, *It's to Laugh (or Cry) About*, WASH. POST, May 8, 2005, at B1.

77. *Id.*

78. Frank Rich, *A Culture of Death, Not Life*, N.Y. TIMES, Apr. 10, 2005, at 13.

news media's coverage of the dying. For example, on September 11, 2001 "NBC ran one clip of a man plunging to his death, and then admitted it was a mistake."[79] Further, in October 2004, the *Boston Herald* published, according to one veteran journalist, "lurid photos"[80] of a young woman "sprawled bleeding on the pavement"[81] after she was hit by a police-fired projectile following the Boston Red Sox World Series victory. The woman would later die from the injuries.[82] Images of the dead from the war in Iraq also have drawn attention and criticism due to their graphic nature.[83] According to Robert Alt, the publication of death images from Iraq was "macabre voyeurism-masquerading-as-news [reflected] by the media response to the tragic events in Fallujah, during which four American contractors were killed and their bodies desecrated not once, but a thousand times over on the evening news and in the morning papers."[84]

The bottom line, as described by a *St. Louis Post-Dispatch* reporter, is that "[t]he media [is] under fire from the left and the right, from anti-war protesters to those who plan wars in the White House."[85] Is it no surprise that they may also come under legal fire from the relatives of the dead, suing to protect images of their deceased loved ones? The American news media is starting to lack credibility[86] and as a consequence, it is likely to be reigned in by the law for its transgressions and abuses. Concomitantly, the privacy rights pertaining to images of the dead are likely to grow as the media's rights to access and publish them recedes.

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79. Jonah Goldberg, *Media Missteps*, NAT'L REV. ONLINE, May 7, 2004, http://www.nationalreview.com/goldberg/goldberg200405070940.asp.

80. Janet Kolodzy, *Pack Journalism: Seen From Two Sides, Darkly*, CHRISTIAN SCI. MONITOR, Nov. 9, 2004, at 9.

81. *Id.*

82. *See* Kevin Cullen & Heather Allen, *O'Toole Defends Crowd-Control Measures*, BOSTON GLOBE, Oct. 22, 2004, at B5 (describing how the incident "left a young person dead") ("[T]he victim, Victoria Snelgrove, a 21-year-old Emerson College student, was struck in the eye socket, the only part of her body where the pepper spray round could penetrate and cause a fatal injury.").

83. *See generally* Lori Robertson, *Images of War*, AM. JOURNALISM REV., Oct.–Nov. 2004, at 46 ("In April 2004 the public saw the mutilated, burned and beaten bodies of four American contractors in Fallujah; the rows of flag-draped coffins coming home from Iraq; and the unfathomable images of the abuse and humiliation of Iraqi prisoners at Abu Ghraib.").

84. Robert Alt, *Flaunting Fallujah*, NAT'L REV. ONLINE, Apr. 29, 2004, *at* http://www.nationalreview.com/alt/alt20040290834.asp.

85. Michael D. Sorkin, *Media Reform Advocates Meet Here, Criticize News Providers*, ST. LOUIS POST-DISPATCH, May 13, 2005, http://www.commondreams.org/cgi-blu/print.cgi?file=/headlines05/0513-0.htm.

86. *See* Alexandra Marks, *Media Mea Culpas Don't End Public Discontent*, CHRISTIAN SCI. MONITOR, Jan. 12, 2005, at 03 ("[T]he media, with all their foibles and strengths, continue to lose credibility with the public even as they strive to correct errors.").

There is evidence that sensationalistic journalism practices are influencing judicial decision-making in this area. The evidence is found in the U.S. Supreme Court's opinion in the *Favish* case involving the death-scene photographs of Vincent Foster.[87] In *Favish*, the Court held that Foster's relatives had a personal privacy interest against the release of the photographs. The Court wrote that "[t]hey seek to be shielded by the exemption to secure their own refuge from a sensation-seeking culture for their own peace of mind and tranquility . . . ."[88] However, the news media nourish, feed, and satiate the sensation-seeking culture avidly attended by television viewers.[89] Justice Kennedy cited favorably the declaration of Foster's sister, Sheila Foster Anthony, in which she wrote, "I fear that the release of [additional] photographs certainly would set off another round of intense scrutiny by the media. Undoubtedly, the photographs would be placed on the Internet for world consumption. Once again my family would be the focus of conceivably *unsavory and distasteful media coverage*."[90] The media, in brief, were very much on the mind of the Court in reaching the conclusion that the concept of personal privacy of Exemption 7(C) of FOIA swept up the relatives of the deceased and was not limited, as Favish had contended, to "control information about oneself."[91]

Similarly, the Court of Appeals of New York, in March 2005, specifically cited the media's propensity for exploitation when it ruled that the dying words of 911 emergency callers on September 11, 2001, were protected from public disclosure.[92] The appellate court reasoned that:

> [I]t is highly likely in this case—more than in almost any other imaginable—that, if the tapes and transcripts are made public, they will be replayed and republished endlessly, and that in some cases *they will be exploited by media seeking to deliver sensational fare to their audience.* This is the sort of invasion that the privacy exception exists to prevent.[93]

In other cases involving images of the dead, the media's propensity

87. *See supra* notes 12–198 and accompanying text.

88. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 166 (2004).

89. *See* Jim Heid, *My Sister's Dead Body is No Longer News*, NEWSWEEK, Sept. 17, 2001, at 12 ("Viewers' morbid curiosity draws them in, and sensational reporting and graphic images keep them there.").

90. *Favish*, 541 U.S. at 167 (emphasis added).

91. *Id.* at 165.

92. *Supra* notes 43–47 and accompanying text.

93. N.Y. Times Co. v. City of N.Y. Fire Dep't, 829 N.E.2d 266, 270 (N.Y. 2005) (emphasis added).

for exploiting death has factored into the judicial decision making process. In 1991, a Florida appellate court allowed a case to proceed to trial after a television station shot and later aired a close-up of the local police chief removing the decedent-victim's skull from an evidence box.[94] The appellate court determined that "[w]e have no difficulty in concluding that reasonable persons in the community could find that the alleged conduct of Channel 2 was outrageous in character and exceeded the bounds of decency so as to be intolerable in a civilized community."[95] The court specifically noted that "[t]he close-up of the skull was intentionally included to create sensationalism for the report. The close-up was gruesome and macabre, and was broadcast to thousands of viewers . . . ."[96]

Similarly, a California appellate court in 1986 considered a case where the wife of a man whose dying moments were captured by a television camera in the couple's apartment without her consent was later broadcast by an NBC station in Los Angeles.[97] The court held that she had successfully stated causes of action both for invasion of privacy and for intentional infliction of emotional distress.[98] In upholding these claims, the court wrote that the facts of the case illustrate

> a widespread loss of certainty about where public concerns end and private life begins, and a loss of personal identity manifested by individual members of the public when confronted by *aggressive media representatives*. Personal security in a society saturated daily with publicity about its members requires protection not only from governmental intrusion, but some basic bulwark of defense against private commercial enterprises which derive profits from gathering and disseminating information.[99]

Similar to the jury, the California appellate court sympathized with the plaintiff-wife.[100] The court remarked that "the last moments of her dying husband's life were filmed and broadcast to the world without any regard for the subsequent protestations of both plaintiffs to the defendants.

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94. *See* Armstrong v. H & C Commc'ns, Inc., 575 So. 2d 280, 283 (Fla. Dist. Ct. App. 1991) (reversing "the trial court's dismissal of the Armstrongs' action based on the tort of outrage").

95. *Id.* at 282.

96. *Id.* at 281.

97. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 670 (Ct. App. 1986).

98. *Id.* at 685 (holding that plaintiff "has stated three causes of action [including invasion of privacy and intentional infliction of emotional distress] against defendants and that since there are triable issues of material fact, the trial court erred in awarding summary judgment . . . .").

99. *Id.* at 682 (emphasis added).

100. *Id.* at 685.

Again, the defendants' lack of response to these protestations suggests *an alarming absence of sensitivity and civility.*"[101]

In summary, the news media's sensational coverage of both the images of the dead and the words of the dying is influencing the emerging jurisprudence of the privacy of death. We live in a time when modern journalism requires what the editor-in-chief of *U.S. News & World Report* recently called "action images and boffo pictures."[102] Indeed, the phrase "'[i]f it bleeds, it leads'" has become "a time-worn TV newsroom cliché."[103] When the bleeding is over, the so-called "boffo pictures" remaining are those of the dead,[104] and the decedent's family members have the opportunity to suppress their publication, then the climate is ripe to develop the law surrounding the privacy of death.

The next part of this article addresses this emerging area of jurisprudence that intertwines statutory freedom of information laws with the tort privacy causes of action and constitutional concerns about freedom of speech.

III. GLIMPSES OF DEATH AND LEGAL DISPUTES: THE CHANGING SHAPE OF THE LAW

A. Privacy and Death: Whose Right Is It Anyway?

It is useful to begin the legal analysis by considering two questions, both of which relate to the individual who could possess privacy interests in the area of privacy-of-death jurisprudence.

First, do the *dead* possess privacy interests in suppressing the publication of certain images and words related to their death?[105] Typically, the answer is no[106] as the precedent supporting such a right is

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101. *Id.* at 682 (emphasis added).

102. Mortimer B. Zuckerman, *Why TV Holds Us Hostage*, U.S. NEWS & WORLD REP., Feb. 28, 2005, at 76.

103. *Id.*

104. Perhaps the most infamous of such photographs dates back long ago to 1928 when the *Daily News* published on its front page a photograph of Ruth Snyder captured at the moment of her death in an electric chair at Sing Sing prison. *See* Mark Fitzgerald, *Final Exposure: Should Newspapers Publish Graphic Execution Photos?*, EDITOR & PUBLISHER MAG., Apr. 24, 2000, at 28–29 (describing the Snyder incident).

105. Of course, such interests are those that survive death and can be legally enforceable on their behalf by living relatives.

106. Fasching v. Kallinger, 510 A.2d 694, 701 (N.J. Super. Ct. App. Div. 1986) ("The general rule is: the right of privacy dies with the individual. The right of privacy is a personal right and cannot, as a general rule, be asserted by anyone other than the person whose privacy is

scarce. Indeed, when such precedent exists, it is usually derived from a statute[107] rather than from the common law. The overwhelming weight of authority suggests that the common law right of privacy does *not* survive an individual's death.[108] For instance, California's appellate courts have held that "the purely personal right of privacy dies with the person"[109] and that "a claim of right to privacy is personal and cannot be asserted by anyone other than the person whose privacy has been invaded. The claim dies with the person."[110] This mirrors the notion in libel law that one cannot defame the dead:[111] when a defamatory statement about a person is published *after* that person's death, the family of the defamed decedent cannot maintain a libel action on behalf of the decedent.[112] This is quite logical—a person's death provides the person with the unfortunate but ultimate escape from any emotional harm that the media might cause.

In the absence of a statute to the contrary, the fact that an individual's right of privacy does not survive his or her death and is not descendible to heirs does not end the inquiry in privacy-of-death jurisprudence. Indeed,

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invaded.") (citation omitted).

107. PEMBER & CALVERT, *supra* note 26, at 265 (noting that "legislatures in several states have passed statutes guaranteeing to heirs the right to protect the commercial exploitation of dead public figures for as long as 50 years" regarding the right of publicity and misappropriation of an individual's name or likeness). *See, e.g.*, CAL. CIV. CODE § 3344.1 (2005) (providing for a statutory right of publicity in a "deceased personality's name, voice, signature, photograph, or likeness" that is freely transferable as a property right and that extends "70 years after the death of the deceased personality"); NEV. REV. STAT. § 597.790(1) (2004) ("There is a right of publicity in the name, voice, signature, photograph or likeness of every person. The right endures for a term consisting of the life of the person and 50 years after his death, regardless of whether the person commercially exploits the right during his lifetime.").

108. Lawson v. Meconi, 2005 Del. Ch. LEXIS 74, at *18–22 (Ct. of Chancery May 27, 2005) (examining and describing the state of the law on this issue).

109. Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 680 (Ct. App. 1986); *see also* Hendrickson v. Cal. Newspapers, Inc., 121 Cal. Rptr. 429, 431 (Ct. App. 1975) ("[I]t is well settled that the right of privacy is purely a personal one; it cannot be asserted by anyone other than the person whose privacy has been invaded, that is, plaintiff must plead and prove that *his* privacy has been invaded. Further, the right does not survive but dies with the person.") (citations omitted) (emphasis in original).

110. Marich v. QRZ Media, Inc., 86 Cal. Rptr. 2d. 406, 419 (Ct. App. 1999) (depublished).

111. *See* Raymond Iryami, Note, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statutes*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083, 1083 (1999) ("[C]ommon law courts have steadfastly refused to provide a private cause of action for defamation of the dead.").

112. *See, e.g.*, Fasching v. Kallinger, 510 A.2d 694, 701 (N.J. Super. Ct. App. Div. 1986) (stating that "a decedent's estate may continue a defamation suit, but only for injuries to reputation occurring while the decedent was alive" and noting, with regard to the case at bar, that "[b]ecause the allegedly defamatory statements in this case were published subsequent to Maria Fasching's death, the action did not accrue during her lifetime and cannot be maintained by an administrator of her estate.").

the relatives of the dead may sustain injuries of their *own*. Injuries to their own sense of privacy and emotional tranquility may arise from media publication of images of their dead family members and next of kin. These injuries are necessarily sustained *after* the death of the relative, when the images of death and/or dying words are either published or sought for publication. In other words, the harm in question need *not* be to the deceased, but to the deceased's immediate relatives.[113] Courts sometimes have referred to this as a relational right of privacy because it seeks to protect people from suffering the unhappiness of unwanted publicity about their deceased relatives.[114] Therefore, "[a] cause of action asserted by a close relative is sometimes called a 'relational' right to privacy."[115]

The growth of privacy-of-death jurisprudence depends largely upon whether the relatives of the dead possess a judicially recognized privacy right of their own sufficient to suppress and punish the release of images that are *not* about themselves but about their deceased loved ones. Although the United States Supreme Court recognized such a privacy interest in *Favish*,[116] courts do not universally agree on the existence of a relational right of privacy in all or even most circumstances.[117] In fact, "[u]nder the majority view, the deceased's relatives may not maintain an action for invasion of privacy, *either* based on their *own* privacy interests *or* as a *representative* for the deceased . . . ."[118] As a California appellate

113. *See* Bazemore v. Savannah Hosp., 155 S.E. 194, 195 (Ga. 1930) (involving the unauthorized publication in a newspaper of a deceased infant child that was born with its heart on the outside of its body); *id* at 197 ("In this case the child was dead when the unauthorized acts were committed, and the right of action could not be in the child, but in the parents.").

114. Metter v. Los Angeles Exam'r, 95 P.2d 491, 495 (Cal. Ct. App. 1939).

115. Cox Broad. Corp. v. Cohn, 200 S.E.2d 127, 130 (Ga. 1973), *rev'd on other grounds*, 420 U.S. 469 (1975). There are other uses in the law of the term "relational privacy" that apply to relationships among living people, particularly family members, and do not only apply to the living and dead-relative relationships. For instance, Associate Professor Radhika Rao of the University of California, Hastings College of the Law, wrote in 2000 that:

> the right of relational privacy casts a mantle of immunity from state interference around intimate and consensual relationships, but it does not necessarily shield commercial transactions between strangers, nor does it apply to object relationships. Relational privacy governs the realm of affective ties rather than arms-length exchange, providing constitutional shelter to personal relationships rather than commercial transactions or object relationships.

Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 456 (2000).

116. *Supra* notes 12–198 and accompanying text.

117. Young v. That Week That Was The Week That Was, 312 F. Supp. 1337, 1340 (N.D. Ohio 1969) ("Virtually all the cases which have passed upon this question . . . have held that an individual has no cause of action for invasion of *his* privacy, where the defendant published information concerning the individual's deceased relative." [To bolster this viewpoint, the court added that "[a] *few* cases are *occasionally cited* as recognizing a *so-called* 'relational' right of privacy." *Id.* at 1341, n.2 (emphasis added)]).

118. Justice v. Belo Broad. Corp., 472 F. Supp. 145, 147 (N.D. Tex. 1979) (emphasis

court once wrote, "[w]here the plaintiff's only relation to the asserted wrong is that he is a relative of the victim of the wrongdoer, and was unwillingly brought into the limelight, no recovery can be had."[119] In other words, not all alleged injuries to relational privacy will be sufficient or serious enough to pass judicial muster.

In the United States, we are "accustomed to thinking about privacy as a personal right."[120] However, "[t]he extent to which privacy is a personal right has been in contention for a long time . . . ."[121] The privacy-of-death jurisprudence challenges our "traditionally understood"[122] notions of privacy as "a personal right that may not be unreasonably infringed upon"[123] because the law is forced to consider relational privacy interests of relatives in the images and words of the deceased. This emerging jurisprudence treats privacy as "a kind of social good"[124] rather than as an individual right. By protecting families from media exploitation and public voyeurism, privacy of death jurisprudence draws a line that the press may not cross. This form of jurisprudence furthers the societal interests of maintaining the dignity of the deceased and of protecting the grieving of relatives. While lobbying against the release of her late husband's autopsy photographs, the widow of racecar driver Dale Earnhardt stated,

> The deceased have a right to their dignity and loved ones have a right to be free from exploitation . . . . Allowing access to these photos will only cause more distress and emotional harm. I'm sure every family in America can understand this. Even people in the public eye have a right to privacy. This right is more important than the desire to exploit a tragic situation, especially when no public good is being served.[125]

Due to these fundamental shifts in the right to privacy, the remainder of the article discusses and analyzes the developing privacy-of-death jurisprudence. In particular, Part III.B describes the various causes of

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119. Hendrickson v. Cal. Newspapers, Inc., 121 Cal. Rptr. 429, 431 (Ct. App. 1975).

120. Annas, *supra* note 4, at 504.

121. Jonathan M. Winer, *Regulating the Free Flow of Information: A Privacy Czar as the Ultimate Big Brother*, 19 J. MARSHALL J. COMPUTER & INFO. L. 37, 43 (2000).

122. Vera Bergelson, *It's Personal But Is It Mine? Toward Property Rights in Personal Information*, 37 U.C. DAVIS L. REV. 379, 403 (2003).

123. *Id.*

124. Paul M. Schwartz & William M. Treanor, *The New Privacy*, 101 MICH. L. REV. 2163, 2179 (2003) (reviewing JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE AND THE LIMITS OF PRIVACY (2001)).

125. Dustin Long, *Widow: Photos Should Stay Private*, ROANOKE TIMES & WORLD NEWS (Va.), Mar. 5, 2001, at B5.

action and theories upon which privacy-of-death litigation may be grounded. Part III.C addresses case law that has recognized the privacy rights of relatives of the deceased.

B. Suppression and Punishment

Privacy-of-death litigation may arise in two basic ways: before-publication disputes and after-publication disputes. Notably, it is analogous to the First Amendment distinction between prior restraints on speech[126] and subsequent punishments.[127] Current court battles that arise over images and words of the deceased involve efforts aimed at either:

1. Suppression of Publication. This occurs when a relative of the deceased or a government entity objects to a request or motion.[128] A motion to suppress publication is most likely filed by a member of the news media, but may be filed by a private citizen in his or her own capacity.[129] Private citizens are usually seeking production of photographs, videotapes, or transcripts under a state or federal freedom of information statute; or

2. Punishment of Publication. This usually occurs when a relative of the deceased files a civil lawsuit based upon the publication, transmission, or dissemination of a photograph, videotape, or other image or recording of the deceased. The relative typically brings a cause of action for public disclosure of private facts[130] or intentional infliction of emotional

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126. Cooper v. Dillon, 403 F.3d 1208, 1215 (11th Cir. 2005) ("A prior restraint on speech prohibits or censors speech before it can take place."); United States v. Frandsen, 212 F.3d 1231, 1236–37 (11th Cir. 2000) ("A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs."); ZELEZNY, *supra* note 25, at 47 ("[P]rior restraint is considered the worst kind of abridgment, and it is permitted only in rare situations when harmful expression could not adequately be punished after the fact.").

127. *See* Alexander v. United States, 509 U.S. 544, 553-54 (1993) (describing how the U.S. Supreme Court's "decisions have steadfastly preserved the distinction between prior restraints and subsequent punishments"); KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 368 (2d. ed. 2003) (observing that there is "special hostility to prior restraint as distinguished from subsequent punishment.").

128. An example of a private citizen filing such a request seeking images of the dead is journalism professor Ralph Begleiter's federal Freedom of Information Act request seeking images of closed caskets of U.S. military personnel killed in Iraq. *Supra* notes 36-38 and accompanying text.

129. *See supra* notes 37–42.

130. Shulman v. Group W. Prods., 955 P.2d 469, 478 (Cal. 1998) (noting that there are four basic elements to this privacy tort: (1) publicity; (2) about a private fact; (3) that is offensive to a reasonable person; and (4) that is not newsworthy or of legitimate public concern); *see* Porten v. Univ. of San Francisco, 134 Cal. Rptr. 839, 841 (Ct. App. 1976) (stating that publicity means "communication to the public in general or to a large number of persons as distinguished from one individual or a few").

distress.[131]

Recent examples of privacy-of-death litigation in the suppression of publication category include (1) *Favish*, in which the immediate relatives of Vincent Foster successfully objected to a federal FOIA request filed by a private citizen for the government production of death-scene photographs of Foster,[132] (2) *Providence Journal Co. v. Town of West Warwick*,[133] in which a newspaper unsuccessfully sought under Rhode Island's Access to Public Records Act tapes of the 911 police emergency telephone calls made by victims who perished in a fire during a concert at a club,[134] and (3) *New York Times Co. v. City of New York Fire Dept.*,[135] in which the plaintiff newspaper sought, under a state freedom of information law, over the objection of New York City Mayor Michael Bloomberg,[136] the tapes of calls made on Sept. 11, 2001 to the fire department's 911 emergency service to see how well the city responded to the terrorist attacks that day.[137]

In each of these three cases, the objecting parties cited and used a personal privacy exemption in their efforts to suppress the release of photographs and dying declarations of the deceased. For instance, New York's Freedom of Information Law exempts from disclosure, documents that "would constitute an unwarranted invasion of personal privacy."[138]

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131. Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety, 110 P.3d 30, 52 (Nev. 2005) (holding that the basic elements of a cause of action for intentional infliction of emotional distress are "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress; (2) severe or extreme emotional distress suffered by the plaintiff; and (3) actual or proximate causation").

132. *See supra* notes 12–19 and accompanying text.

133. No. 03-2697, 2004 R.I. Super. LEXIS 136 (R.I. Super. Ct. 2004).

134. *Id.* at *6-7 (in rejecting the newspaper's request for these tapes and citing a privacy exemption to Rhode Island's open records act, the trial court judge wrote that "[t]hese calls are intensely personal and are intimately intertwined with the Station fire tragedy as it was unfolding. These communications are entitled to protection whether initiated by victims or family members to avoid a highly intrusive interference with the legitimate privacy entitlement these individuals should be afforded.").

135. 829 N.E.2d 266 (N.Y. 2005).

136. *See* Michael Cooper, *City and Times Argue in Court Over Firefighters' 9/11 Accounts*, N.Y. TIMES, Feb. 10, 2005, at B4 (describing the legal fight over the transcripts of the calls, and writing that "[t]he Bloomberg administration initially sought to withhold all the material sought by The Times. Now the city says it is willing to release much of it but wants to remove portions. The city argues that the release of some of the material would violate the privacy of victims and their families.").

137. *See New York Times Co.*, 829 N.E.2d at 269–71 (writing that the "Fire Department does not now oppose disclosure of the words spoken in the 911 calls by 911 operator" but concluding "the public interest in the words of the 911 callers is outweighed by the interest in privacy of those family members and callers who prefer that those words remain private.").

138. N.Y. PUB. OFF. § 87(2)(b) (2005).

Likewise, Rhode Island's Access to Public Records Act provides an exemption for documents that "could reasonably be expected to constitute an unwarranted invasion of personal privacy . . . ."[139] However, the Federal Freedom of Information Act exemption at issue in *Favish* restrains disclosure of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information would. . . constitute an unwarranted invasion of personal privacy."[140]

It is important to note that, while each of these three exemptions are phrased in terms of "personal privacy," each was invoked to protect the privacy interests *not* just of the decedent about whom the information in question pertained but also the relatives of the deceased. The word "personal," in other words, may be interpreted and construed more broadly to mean "familial." As the United States Supreme Court wrote in *Favish*, "[t]he right to personal privacy is not confined, as Favish argues, to the 'right to control information about oneself.'"[141] Instead, the Court found that the term "personal privacy" included the privacy interests of Foster's relatives in their "own right and interest to personal privacy. They seek to be shielded by the exemption to secure *their own refuge* from a sensation-seeking culture for their own peace of mind and tranquility, not for the sake of the deceased."[142] It is through such expansive statutory construction that privacy-of-death jurisprudence will enlarge and develop.

As noted above, however, the current wave of privacy-of-death disputes involves not only efforts to suppress and restrain publication of photographs of the dead and transcripts of their dying words, but also attempts to punish those who already have disclosed and published such information. The First Amended Complaint filed in *Showler v. Harper's Magazine Foundation* falls into the punishment-of-publication category.[143] In this case, the plaintiff-father and the state administrator based multiple causes of action—intentional infliction of emotional distress, invasion of privacy, unjust enrichment, and negligence—upon the facts surrounding the capture and publication by *Harper's* of a photograph of the remains of a National Guardsman in an open casket that were taken at the deceased's funeral.[144] According to the plaintiff's attorney, "the press were instructed

139. R.I. GEN. LAWS § 38-2-2(4)(i)(D)(c) (Supp. 2005).

140. 5 U.S.C. § 552 (b)(7)(C) (2004).

141. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 165 (2004).

142. *Id.* at 166 (emphasis added).

143. First Amended Complaint at 4, Showler v. Harper's Mag. Found., No. 05-CV-178-S (E.D. Okla. filed June 14, 2005).

144. *Id.* at 6–7, 14–16 (setting forth these causes of action).

not to take photographs during the funeral" but the *Harper's* photographer violated the instruction by taking the photographs and publishing them.[145]

Another punishment-of-publication case, filed in Washington State by relatives of several decedents against non-media defendants, is *Reid v. Pierce County*.[146] It centered on claims for the torts of outrage—akin to intentional infliction of emotional distress, negligent infliction of emotional distress, and invasion of privacy—by employees of the Pierce County Medical Examiner's Office.[147] For instance, one plaintiff was Karen Reid, a niece of the late Washington Governor Dixie Lee Ray, who learned that Ray's autopsy photograph was among those shown at cocktail parties and used by at least one employee to create personal scrapbooks.[148] Although the plaintiffs lost on their outrage[149] and negligent infliction of emotional distress claims, largely because they were not present to see the autopsy photos when they were exposed at the cocktail parties,[150] the Washington Supreme Court nonetheless recognized that the plaintiffs may possess a privacy interest and rejected the argument of the defendants to the contrary.[151] The court wrote

> The County argues if any right of privacy was violated it was that of the deceased and not of the relatives of the deceased. The County asserts the general rule is that privacy is a personal interest and may not be brought by a relative of a deceased person. This argument, however, flies in the face of our previous cases, legislation, and memoranda from the County itself.[152]

The Supreme Court of Washington thus held in *Reid* that "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the dignity of the deceased."[153] The court

145. *Open-Casket Photo Sparks Privacy Suit Against Magazine*, REP. COMMITTEE FOR FREEDOM OF THE PRESS, http://www.rcfp.org/news/2005/0620-pri-openca.html (June 20, 2005).

146. Reid v. Pierce County, 961 P.2d 333 (Wash. 1998).

147. *Id.* at 335.

148. *Id.*

149. *See id* at 338 ("Plaintiffs . . .were simply not present when the conduct occurred. Even if we were inclined to find the tort of outrage available to plaintiffs, we would be required to overlook the presence element.").

150. *See id* ("None of the Plaintiffs were present at the scene where the tortious action occurred and, therefore, are not entitled to maintain an action for negligent infliction of emotional distress").

151. *Id.* at 343.

152. Reid v. Pierce County, 961 P.2d 333, 339 (Wash. 1998).

153. *Id.* at 342.

concluded that the plaintiffs "may maintain a civil action for invasion of privacy under the common law."[154] In reaching this conclusion, the court agreed with the reasoning of a Florida district court that held "'it may be that a defendant's conduct towards a decedent will be found to be sufficiently egregious to give rise to an independent cause of action in favor of members of decedent's immediate family.'"[155]

Another punishment-of-publication case is *Armstrong v. H & C Communications, Inc.*,[156] a case described earlier, which involved the video tape of a young murder victim's skull that later aired on the evening news.[157] The Florida appellate court in that case allowed a claim of outrage to go to trial but rejected a cause of action for public disclosure of private facts because the discovery of the girl's remains "and their possession by the police, were legitimate matters of public interest."[158] The court rejected the privacy claim not because the parents lacked a privacy interest to begin with but rather because the image was newsworthy.[159] Specifically, the court cited *Bazemore v. Savannah Hospital*,[160] a 1930 decision by the Georgia Supreme Court, which upheld

> a complaint by the parents of a deceased child against a hospital, a photographer, and a newspaper for the unauthorized publication of a picture of their malformed child, which had been born with an external heart. It was alleged that the unauthorized taking and publication of the photograph had violated the parents' privacy rights, causing them humiliation and disgrace.[161]

With this interpretation of the facts of *Bazemore* in mind, the *Armstrong* court, some sixty-one years later, distinguished it from the television station's airing of the murdered Florida girl's skull on the basis that the birth of a malformed child "was a matter of private, not public, concern."[162]

Although the *Bazemore* opinion is now seventy-six years old, it is still good law. In fact, it was cited favorably by the United States Supreme

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154. *Id.* at 343.

155. *Id.* at 342 (quoting Loft v. Fuller, 408 So. 2d 619, 624 (Fla. Dist. Ct. App. 1981).

156. Armstrong v. H & C Commc'ns., Inc., 575 So. 2d 280 (Fla. Dist. Ct. App. 1991).

157. *Supra* notes 94–95 and accompanying text.

158. *Armstrong*, 575 So. 2d at 283.

159. *Id.* at 283 (citing as precedent the case of *Bazemore v. Savannah Hosp.*, 155 S.E. 194 (Ga. 1930)).

160. *Bazemore*, 155 S.E. at 194.

161. *Armstrong*, 575 So. 2d at 283 (citing *Bazemore*, 155 S.E. at 194).

162. *Id.*

Court in *Favish* to support the Court's finding of a well-established common law tradition that acknowledges the privacy rights of family members over images of their deceased loved ones.[163] By coupling the *Bazemore* opinion with the *Schuyler v. Curtis* opinion,[164] the *Favish* Court resuscitated privacy-of-death jurisprudence.

With the privacy-of-death dichotomy between *suppression* of publication and *punishment* of publication in mind, the next part turns to the analysis of the courts that have recognized the privacy rights of relatives in this area. An understanding of the policy justifications for the recognition of this right are necessary in order to identify the set of factors articulated in Part III and to address the issue of whether a qualified right of privacy of immediate relatives yields to other competing interests.

C. *The State of the Case Law and Judicial Analysis of the Interests and Issues*

What are the interests and injuries at stake that justify the existence of a privacy-of-death jurisprudence and, in particular, relational privacy rights in this emerging area of the law? The answer largely lies in a potent combination of two elements: the dignity of the deceased and the resulting injury to the emotional tranquility of the surviving relatives when that dignity is violated through media publication and exploitation. For instance, the Court of Appeals of New York upheld the privacy interests of the relatives of those who perished in the World Trade Center towers on Sept. 11, 2001 and whose dying words were recorded on emergency 911 telephone calls:

> It is normal to be appalled if intimate moments in the life of one's deceased child, wife, husband or other close relative become publicly known, and an object of idle curiosity or a source of titillation. The *desire to preserve the dignity of human existence* even when life has passed is the sort of interest to which legal protection is given under the name of privacy. We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead.[165]

Likewise, the Superior Court of Rhode Island, in justifying its

163. *See Favish*, 541 U.S. at 169 (citing the *Bazemore* opinion for "recognizing parents' right of privacy in photographs of their deceased child's body").

164. *Supra* note 18 and accompanying text.

165. N.Y. Times Co. v. City of N.Y. Fire Dep't., 829 N.E.2d 266, 269 (N.Y. 2005) (emphasis added); *see supra* notes 14-18 and accompanying text (discussing the Freedom of Information Act).

decision to prevent disclosure of certain emergency tapes of calls from dying victims of a major fire, wrote that "[t]o allow access to victim/family members [sic] calls would be at variance with the purpose of APRA which recognizes the *desirability of preserving individual dignity.*"[166] Additionally, the Supreme Court of Washington in *Reid v. Pierce County*[167] held that "the immediate relatives of a decedent have a protectable privacy interest in the autopsy records of the decedent. That protectable privacy interest is grounded in maintaining the *dignity of the deceased.*"[168]

While it is the relatives who hold the protectable privacy interests in these cases, the locus of the dignity that suffers injury may actually be with the deceased, as in the *Reid* case noted above.[169] Similarly, in the case involving the 911 emergency calls from the World Trade Center towers, it was "[t]he desire to preserve the *dignity* of human existence *even when life has passed* . . . ."[170]

Not surprisingly, the dignity-of-the-dead concept is central to relational privacy in the privacy-of-death jurisprudence and is gaining increased, albeit contested, recognition in the law. This recognition may be evidenced by Oregon's Death With Dignity Act, which "authorizes physicians to prescribe lethal doses of controlled substances to terminally ill Oregon residents according to procedures designed to protect vulnerable patients and ensure that their decisions are reasoned and voluntary."[171] That law, which in 2005 was under review by the United States Supreme Court, suggests an increasing societal recognition of the important legal relationship between death and dignity, as the very name of the law—the Death with Dignity Act—illustrates.[172] Therefore, it follows that the debate will spill over from discussions and litigation about the manner in which one is entitled to die with dignity[173] to protection of that person's dignity

166. Providence Journal Co. v. Town of W. Warwick, No. 03-2697, 2004 R.I. Super. LEXIS 136, at *7–8 (R.I. Super. Ct. 2004) (emphasis added).

167. Reid v. Pierce County, 961 P.2d 333 (Wash. 1998).

168. *Id.* at 342 (emphasis added).

169. *Id.*

170. *N.Y. Times Co.*, 829 N.E.2d at 269 (emphasis added).

171. Oregon v. Ashcroft, 368 F.3d 1118, 1122 (9th Cir. 2004), *aff'd*, Gonzales v. Oregon, 126 S. Ct. 904 (2006).

172. *See generally* Betty Rollin, *In the End, Peace of Mind*, L.A. TIMES, Sept. 25, 2005, at M5 (observing that oral argument in the U.S. Supreme Court considering the constitutionality of Oregon's Death With Dignity law was scheduled for October 5, 2005, and noting that Oregon is "the only state in the nation that gives you a choice about how and when to die").

173. The question of death-with-dignity was played out in the death of Terri Schiavo discussed earlier in this article. *See generally* Paul Boudreaux, *Powers Clash Over Schiavo Heart and Mind Conflict*, TAMPA TRIB. (Fla.), Mar. 27, 2005, at Commentary 1 ("The heart is unable to speak with any intelligence either to medical science or to the legal claims regarding Schiavo's

after death. From a privacy perspective, the only difference is that the death-with-dignity debate over physician-assisted suicide centers on *privacy of choice* in the decision-making process, while the privacy-of-death jurisprudence centers on *privacy of information* in the release and publication process.

In summary, the injury element in the privacy-of-death jurisprudence is based upon the nexus between the dignity of the dead and the emotional tranquility of the living.[174] For instance, in *Favish* the United States Supreme Court was careful to point out that the privacy interest of the plaintiffs—the deceased's relatives—was "their own peace of mind and tranquility . . . ."[175] This interest, in turn, could be harmed by what the Court called "unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own."[176] The phrase "rites and respect"[177] in that statement is tantamount to the dignity of "the deceased person who was once their own."[178] In a nutshell, as one court put it more than a century ago, the relatives of the dead seek "to prevent a violation of their own rights in the character and memory of the deceased."[179]

With the surviving relatives' privacy interests in mind, courts must next determine whether their interests justify suppression or punishment for publication in all cases involving death imagery and dying words of their deceased relatives. This question is particularly relevant because, as a Texas appellate court observed in 2001, "[p]hotographs of deceased persons are *not* undignified per se, and generally cannot be said to violate the deceased's dignity by mere publication."[180] In *Cox Texas Newspapers v. Wooten*, which centered on a photograph of a dead woman published in

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privacy right to die with dignity or her parents' right to keep her alive."). California also entered the debate over the legal concept of death with dignity in the context of physician-assisted suicide. *See* Nancy Vogel, *Assembly Panel Approves Assisted-Suicide Bill*, L.A. TIMES, Apr. 13, 2005, at B6 (describing how a "bill to allow terminally ill Californians to end their lives with lethal prescriptions" was being considered in the California Assembly in 2005); Nancy Vogel, *Legislators Drop Suicide Bill for Now*, L.A. TIMES, July 12, 2005, at B1 (writing that the death with dignity bill that had been pending in 2005 in the California Assembly "died quietly in the California Legislature . . . with proponents still struggling against steady religious and cultural currents").

174. *See supra* note 11 and accompanying text.

175. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 166 (2004).

176. *Id.* at 168.

177. *Id.*

178. *Id.*

179. Schuyler v. Curtis, 42 N.E. 22, 25 (N.Y. 1895).

180. Cox Tex. Newspapers v. Wooten, 59 S.W.3d 717, 722 (Tex. App. 2001) (emphasis added).

the *Austin American Statesman*, the court wrote that "the photograph of a deceased woman in repose in a coffin, wearing a long white dress and a crucifix, with her face concealed and her hands solemnly enfolding a prayer book, is an image that accords both solemnity and dignity to the subject."[181] In stark contrast to such a dignified image of death is a photograph of a deformed, naked, and deceased infant born with his heart outside his body, precisely the situation in *Bazemore v. Savannah Hospital*.[182]

As applied to privacy-of-death jurisprudence, the comparison of the *Cox Texas Newspapers* and *Bazemore* cases suggests that there is not necessarily an affront to the dignity of the dead by publishing certain postmortem images of them. Rather, the nature of the photograph in question—precisely what it shows and how it portrays it—may be a pivotal factor in determining the existence of a relational privacy violation. For instance, it would be extremely difficult to conclude that any relational privacy rights were violated by photojournalists who took and published pictures of slain military personnel reposed inside pristine, closed flag-draped coffins at Dover Air Force Base in Delaware. These are not, to put it bluntly, graphic images of men and women with grotesque and lethal wounds.[183] Yet, the government has imposed just such a ban because, according to President George W. Bush, "banning the photography protects the privacy of the families of the dead."[184] While this executive policy has been in place since 1991, the Pentagon has also issued its own directive to ensure that "deceased military personnel [from the Iraqi conflict] returning

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181. *Id.*

182. Bazemore v. Savannah Hosp., 155 S.E. 194, 195 (Ga. 1930); *see* Cox Broad. Corp. v. Cohn, 200 S.E.2d 127, 131(Ga. 1973) (interpreting the *Bazemore* decision to stand for the proposition that the "surviving parents' complaint properly stated a cause of action against the newspaper" and that "the parents of the deceased infant had a cause of action against the newspaper because of its public disclosure which affected them, the parents" after the newspaper published "a photograph depicting their deformed infant").

183. Some people, in fact, argue that such photographs should be made public since they actually honor the dead, rather than degrade their dignity, and facilitate the grieving process. As the mother of a U.S. soldier killed in Iraq stated in a guest column in the *Buffalo News*:

> The pictures of these solemn ceremonies at Dover and the flag-draped caskets should be shown every night on the evening news and on the front page of every newspaper—so all families can see and feel the loss each represents. The families of the fallen need to know that we are not alone in our grief.

Karen Meredith, *Military's Ban on Coffin Photos Hurts Families*, BUFF. NEWS, Mar. 24, 2005, at A8.

184. Sheryl Gay Stolberg, *Senate Backs Ban on Photos of G.I. Coffins*, N.Y. TIMES, June 22, 2004, at A17; *see* Michael Tracey, *Public's Duty to See Policy Results*, ROCKY MTN. NEWS, May 1, 2004, at 14C ("The White House has claimed that they were protecting the *dignity of the dead and the privacy of their families*, but many families were desperate for their lost to have their moment on the evening news.") (emphasis added).

to or departing from" airbases receive no news coverage.[185]

Courts deciding privacy-of-death issues need to conduct a case-by-case, image-by-image examination of the precise details in each photograph and recording at issue. Additionally, courts seem very concerned with the circumstances that surround each death. In other words, the violation concerns not only the image or recordings of the dead, but also the events that gave rise to the death. For instance, in recognizing relational privacy interests in the lawsuit pertaining to the nightclub fire in West Warwick, Rhode Island,[186] the trial court judge wrote that the request by the *Providence Journal* for 911-call recordings of the victims came "in the wake of this unprecedented human tragedy."[187] Similarly, the Court of Appeals of New York, in acknowledging the privacy interests of relatives of those who died in the World Trade Center as the result of the Al-Qaida terrorist attacks, wrote

> the September 11 callers were part of an event that has received and will continue to receive enormous—perhaps *literally unequalled*—public attention. Many millions of people have reacted, and will react, to the callers' fate with horrified fascination. Thus it is highly likely in this case—*more than in almost any other imaginable*—that, if the tapes and transcripts are made public, they will be replayed and republished endlessly . . . .[188]

The New York court's language, as well as that of the Rhode Island Superior Court in *Providence Journal Company*, suggests a potential maxim: the more horrific, tragic, and unusual the circumstances surrounding the death, the more likely courts will recognize the privacy interests of relatives in the dignity of the dead. Such a maxim would be consistent with the few cases recognizing relational privacy rights in false light invasion of privacy claims;[189] courts have stressed that the circumstances must be particularly "egregious."[190]

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185. *Id.* at A17.

186. *Supra* notes 21-23 and accompanying text (describing the case).

187. *Providence Journal Co.*, No. 03-2697, 2004 R.I. Super. LEXIS 136, at *12.

188. *N.Y. Times Co.*, 829 N.E.2d 266, 270 (N.Y. 2005).

189. *See generally* DOMINICK VETRI, TORT LAW AND PRACTICE 1022 (1998) (setting forth the four basic elements of a false light privacy claim and writing that "[f]alse light cases often are much like defamation cases" but "may be independent of defamation only where the statement is not quite derogatory enough to be defamatory, but still might be highly offensive to a reasonable person and, therefore, be actionable as false light").

190. *See, e.g.*, Tyne v. Time Warner Ent. Co., 336 F.3d 1286, 1292-93 (11th Cir. 2003), *certified question answered*, 901 So. 2d 802 (Fla. 2005) (discussing relational privacy claims in the context of false light invasion of privacy lawsuits and noting that, when allowed by courts,

Another factor that courts may consider in deciding whether a relational privacy interest exists in a particular case, trumping a request for access to information about the dead, is the amount of time that has elapsed since the deceased passed away. For instance, in April 2005, the Supreme Judicial Court of Maine considered the privacy interests of deceased persons and their families after a newspaper sought to obtain under a state freedom of information law investigative records pertaining to eighteen dead priests who allegedly molested minors.[191] Although the case did not deal with images of death or dying words, the court's reasoning on the threshold question of relational privacy interests is relevant for privacy-of-death jurisprudence:

> Our in camera inspection of the records reveals that *the passage of time has substantially dissipated or extinguished the privacy interests of the deceased priests*, if any, and of their relatives. The length of time from both the alleged misconduct by the priests and their deaths is measured in decades, not years. The median number of years since the priests' deaths is twenty-five, and the average number of years since the acts of alleged abuse exceeds forty. The earliest acts of abuse are alleged to have occurred in the 1930s, and the most recent acts of abuse are alleged to have occurred not later than 1983.[192]

This time-passage factor in the judicial calculus of privacy-of-death jurisprudence indicates that the privacy interests of relatives are greatest when little time has passed between the death of the loved one and the request for access to information. As the court stated, disclosure of information about the deceased is more likely to "adversely affect the peace of mind of his or her family in the years immediately following death [and] will have considerably less effect many years later."[193] The logic here presumes, at least in part, that the law will or should protect a fixed grieving period for the surviving relatives of the publicized decedent after which time the relations' privacy rights terminate. Thus, the Maine court contrasted the request for information about the deceased priests with the United States Supreme Court's analysis in *Favish*, writing that "[t]he threat of the unwarranted public exploitation of grieving family members that was central to the outcome in *Favish* is not present here."[194]

Indirect calls for legal recognition of a family's right to grieve in

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they are based on rare circumstances).

191. Blethen Me. Newspapers, Inc. v. Maine, 871 A.2d 523, 525 (Me. 2005).

192. *Id.* at 531 (emphasis added).

193. *Id.*

194. *Id.* at 533.

private and for general familial grieving periods permeate a 2005 civil lawsuit filed in federal court in Oklahoma. This case, filed against *Harper's* magazine, was based on the taking and publication of a photograph of a deceased National Guard member in an open-casket funeral.[195] In opposition to a motion to dismiss the lawsuit, Douglass Stall, the plaintiffs' attorney, argued that "Specialist Kyle Showler Brinlee's family *grieved* over his lifeless body once at the funeral; and they have a right to never again experience the unimaginable anguish of viewing his remains."[196] The same brief later contends that the First Amendment's Free Press Clause does not "allow the Defendants to invade the privacy of the *grieving family members*."[197] The United States Supreme Court in *Favish* wrote that "[f]amily members have a personal stake in honoring and *mourning their dead*,"[198] conveying that there is a recognized grieving period as a zone or sphere of familial privacy—one that is protected from intrusion and exploitation.

With this background on the legal issues surrounding the privacy-of-death jurisprudence in mind, the next part of this article turns to the tension between protecting relational privacy rights and allowing the public access to the images and, quite literally, voices of death.[199] In particular, it proposes six factors for courts to weigh and consider when attempting to balance these interests.

IV. A QUALIFIED RIGHT OF RELATIONAL PRIVACY: STRIKING THE PROPER BALANCE BETWEEN DIGNITY AND PUBLICITY

Many federal appellate courts have long recognized a qualified right of privacy that allows journalists to keep their sources confidential in situations other than those involving grand jury and special prosecutor subpoenas.[200] However, the privilege can be overcome in certain

195. *Supra* notes 25–33 and accompanying text.

196. Plaintiffs' Brief in Support of Their Response and Objection to Defendant Harper's Magazine Foundation's and Peter Turnley's Motion to Dismiss for Failure to State a Claim for Which Relief can be Granted at 1, Showler v. Harper's Magazine Found., No. 05-CV-178-S (E.D. Okla. June 15, 2005) (emphasis added).

197. *Id.* at 6 (emphasis added).

198. *Favish*, 541 U.S. at 168 (emphasis added).

199. *See generally Providence Journal Co.*, No. 03-2697, 2004 R.I. Super. LEXIS 136 (describing the interests balanced).

200. *See* Lee v. Dept. of Justice, 413 F.3d 53, 58 (D.C. Cir. 2005) (describing the recognition by United States Court of Appeals for the District of Columbia Circuit of a "reporter's privilege in civil actions" that is "qualified, not absolute"); Laura R. Handman, *Protection Of Confidential Sources: A Moral, Legal And Civic Duty*, 19 NOTRE DAME J. L. ETHICS & PUB. POL'Y 573, 577 (2005) (writing that "[f]ederal courts have recognized a reporter's

circumstances when the need to know the identity of a source outweighs the privacy interest of the reporter-source relationship.[201]

Such a qualified privilege and right should be recognized in another area of law. However, this time the privilege should not protect the press but instead should be used to hinder and punish its newsgathering. Based upon four key factors, it is sensible and sagacious for courts and legislatures to recognize a relational right to privacy that would expand the privacy-of-death jurisprudence. The four factors are 1) the reasoning of the *Favish* decision that went beyond mere statutory analysis to favorably acknowledge and recognize common law traditions regarding death and privacy,[202] 2) the media's apparent fixation on death and its propensity to publish sensational images,[203] 3) the increasing societal concerns regarding the dignity of death and the dead in other contexts,[204] and 4) the logic of the cases described throughout this article that has recognized a relational right of privacy to protect against either or both the release and publication of images and words of death.

It is a propitious time to address the issue. Privacy has become "a dominant theme in public policy in the United States."[205] Debate about relational privacy rights should be a part of this discussion. Legislative bodies should adopt statutes recognizing a qualified right of privacy that allow relatives of the deceased both to suppress access to images of death and to punish those entities and individuals who exploit such imagery through mass dissemination and publication.

Just as there is a tension between data privacy and free speech,[206] another contentious area of privacy law, there is a tension between death privacy and free speech. Photographs of death and the dead may be newsworthy, and the public may have a legitimate interest in viewing them. This issue raises First Amendment concerns of free press and expression.[207]

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privilege grounded in the First Amendment that provides journalists with a qualified right to resist efforts to compel testimony about their confidential sources or about unpublished information gained in the course of researching a story").

201. *See generally* DAY, *supra* note 63, at 175–86 (providing helpful background on both the ethical and legal issues and policy considerations involving journalists' promises of confidentiality to their sources).

202. *Supra* notes 11–17 and accompanying text.

203. *Supra* Part II.

204. *Supra* notes 161–163 and accompanying text.

205. Anita L. Allen, *Privacy Isn't Everything: Accountability as a Personal and Social Good*, 54 ALA. L. REV. 1375, 1375 (2003).

206. *See generally* Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005) (discussing this tension).

207. For example, when the *Columbus Dispatch* ran a photograph of a dead U.S. soldier killed in Iraq on its front page in November 2003, it was justified on the ground that "it's

Thus, the relational privacy right must be qualified rather than an absolute or impenetrable barrier. Therefore, when issues arise, such as the release of autopsy photographs that might serve a public purpose,[208] some legislative bodies have adopted specific factors that judges must consider in deciding whether there is good cause to release the autopsy photographs.[209]

With this in mind, courts should balance specific factors whenever there is a statutory request made to a government entity for images (or voices) of death. Using a totality of the circumstances approach, a court should consider whether: (a) government officials or close relatives of the deceased object to disclosure on grounds that the relatives' privacy interests will be harmed by the publicity surrounding publication of the photos or tapes; or (b) the relatives of the deceased file a civil lawsuit, in which the relatives claim that their own interests in privacy and/or emotional tranquility have been harmed by the publicity given to post-life images or the dying words of their loved ones.

This article proposes numerous factors that courts should consider when weighing the strength of the relational privacy interest of relatives against the public's right to have access to the visual and auditory details of death and the dead. These factors are drawn not only from the logic of the cases discussed earlier but also from the basic principles of the tort of

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sometimes necessary to run a photo with such a terrible, gruesome story to bring the gravity of the situation home." Benjamin J. Marrison, *Photos of Dead Used Sparingly, if Newsworthy*, COLUMBUS DISPATCH (Ohio), Nov. 30, 2003, at 1B. Another editor added, "I felt that if we don't occasionally show the starkness, the tragedy, the bleak nature of war, we really aren't communicating the whole story to the readers." *Id.* In brief, there are justifications for publishing some images of death that may, in some circumstances, trump privacy interests.

208. For instance, the *Orlando Sentinel* sought the autopsy photographs of Dale Earnhardt for the specific purpose of trying to determine what caused his death and, in particular, whether the use of a particular head and neck support device could have saved his life. *See* Terry Blount, *Two Sides to Earnhardt Autopsy Furor*, HOUS. CHRON., Mar. 10, 2001, at Sports 11 (reporting that "[t]he *Sentinel* editors have stated they have no intention of printing the photographs, but instead want to have their own medical expert look at the photos and make certain the Volusia County, Fla., medical examiner correctly reported the cause of death" and quoting the *Sentinel*'s editor for the proposition that "we believe there's interest about the question of NASCAR safety"); Jerry F. Boone, *Information in Autopsy Photos Could Help Prevent More Deaths*, OREGONIAN (Portland, Or.), Mar. 15, 2001, at D07 (contending that "the *Orlando Sentinel's* experts should be allowed to look at the autopsy photos from Dale Earnhardt's fatal crash" because it may help prevent such tragedies in the future had it turned out that a safety device could have saved his life).

209. For instance, Indiana law requires a judge to consider four factors in such a good-cause policy determination, including: "(1) whether the disclosure is necessary for the public evaluation of governmental performance; (2) the seriousness of the intrusion into the family's right to privacy; (3) whether the disclosure of the photograph, video recording, or audio recording is by the least intrusive means available; and (4) the availability of similar information in other public records, regardless of form." IND. CODE ANN. § 16-39-7.1-4(b) (Supp.2004).

public disclosure of private facts.[210] The factors are to be considered holistically, with no single factor controlling or weighing more than any other.

1. Time Passage— The Length of Time Since Death

This factor is drawn from the logic of the Supreme Judicial Court of Maine in its 2005 opinion *Blethen Maine Newspapers, Inc. v. Maine*,[211] discussed in Part III.[212] The greater the amount of time that has passed since the death of the individual depicted in the death-scene photo, autopsy image, or dying-words audiotape, the less interest and justification exist for protecting the privacy interests of the relatives. Accordingly, there is an inverse or negative correlation[213] between the variables of time and privacy: the greater the length of time that has passed, the lesser the privacy interest. Relatives are entitled to a period of grief, but eventually that period must close in the name of the public's right to know. The precise amount of time when the interest in grief surrenders to the interest in public access is a flexible determination for judges. The determination should take into account factors such as expert testimony of grief counselors, the relatives' own testimony, and the manner of the death itself (assuming that some manners of death are less traumatic than others).

2. Circumstances of Death – The Gravity of Events

This factor is drawn from several opinions discussed earlier,[214] including *New York Times Co. v. City of New York Fire Dept.*[215] and *Providence Journal Co. v. Town of West Warwick*:[216] The more horrendous and extraordinary the circumstances surrounding the death of

210. *See generally* KENT R. MIDDLETON & WILLIAM E. LEE, THE LAW OF PUBLIC COMMUNICATION 182-192 (2006) (describing some of the basic principles of the tort of public disclosure of private facts).

211. Blethen Me. Newspapers, Inc. v. Maine, 871 A.2d 523 (Me. 2005).

212. *Supra* notes 191–194 and accompanying text.

213. A negative relationship is "[a] relationship in which the variables change in the opposite directions. For example, if as variable *A* increases, variable *B* decreases, their relationship is negative." LISA J. MCINTYRE, NEED TO KNOW: SOCIAL SCIENCE RESEARCH METHODS 299 (2005) (emphasis in original). *See generally* GUIDO H. STEMPEL, III, ET AL., MASS COMMUNICATION RESEARCH AND THEORY 158-59 (2003) (discussing the concepts of correlation, positive correlation, and negative correlation as used in communication and social science research).

214. *Supra* notes 163-164 and accompanying text.

215. N.Y. Times Co. v. City of N.Y. Fire Dep't., 829 N.E.2d 266 (N.Y. 2005).

216. Providence Journal Co. v. Town of W. Warwick, No. 03-2697 2004 R.I. Super. LEXIS 136 (R.I. Super. Ct. 2004).

the individual, the greater the relational privacy interests of the relatives in suppressing publication of death images and words. In other words, there is a positive correlation[217] between the circumstances of death and the privacy interests: the greater the tragedy, the greater the privacy interests. To some extent of course, any and all death is tragic. However, this second factor focuses on the nature and circumstances of the death. For instance, some deaths are of natural causes and medical conditions. In contrast, the attack on the World Trade Center was horrendous, extraordinary, and extreme, and the fire at the nightclub considered in *Providence Journal* was one of the worst of its kind in the history of the United States.[218]

3. Contents of Communications —What is Seen and Heard

The third factor concentrates on the actual content of the images and recordings at issue. In other words, what is portrayed in the photograph or tape recording to which the relatives object? How graphic is the image? How troubling is the voice? All images of death are not depicted equally. The third factor is based, in part, on the analysis of the Texas court discussed in Part II, which emphasized that all images of death are not per se undignified.[219] Thus, there is a negative correlation under this factor for courts to take into account: the more dignified the image of the dead, the less interest in relational privacy.

4. The Relative Offended — Closeness of Connection to the Decedent

Courts applying this factor should examine the relationship between the relative seeking to suppress and/or punish publication and the decedent who is pictured in the offending image or heard on the tape recording. In other words, how distant is the connection between the living and dead? The United States Supreme Court in *Favish* wrote that its ruling "extends to *family members* who object to the disclosure of graphic details surrounding their relative's death."[220] However, the court failed to clarify how far out of the immediate family circle the legally recognized relational privacy interests extend. Surely there are some relatives who are so distant to the deceased that their own privacy interests are minimal in terms of

217. A positive relationship is one "in which the variables change in the same direction. For example, if as variable *a* increases, variable *b* increases, their relationship is positive." MCINTYRE, *supra* note 213, at 300 (emphasis in the original).

218. *See* Powell & Lee, *supra* note 20 (describing the fire).

219. *Supra* note 180 and accompanying text.

220. Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157, 171 (2004) (emphasis added).

suppressing images or sounds of the decedent's death. Therefore, the greater (closer) the connection between the surviving relative asserting a privacy interest and the deceased, the greater the privacy interest at stake to be balanced against the public's right to know. The line here should not be conclusively drawn by the degree of blood relations between relatives. For example, the deceased could have been raised or cared for by some relative other than a biological parent. Thus, other circumstances must be taken into account when making this determination.

5. The Deceased — Public Prominence and Voluntary Attention

When determining whether information is newsworthy under the tort of public disclosure of private facts, courts "may consider several factors in determining whether information published is newsworthy, including the social value of the facts published, the extent to which the article intruded into ostensibly private affairs, and whether the person voluntarily assumed a position of public notoriety."[221] The more prominent the deceased was during his or her lifetime and the longer the period during which the deceased was in the public eye, the greater the right of the public to access the images of death.

6. Justifications for Access — Morbid Interests and Sensational Prying

Three decades ago, in considering an invasion of privacy case for public disclosure of private facts, the United States Court of Appeals for the Ninth Circuit noted that some facts might be sought and published not because they are particularly newsworthy but because they amount to "a morbid and sensational prying into private lives for its sake."[222] Under the sixth factor, courts should address and consider the purpose for which the requested information is sought and, in particular, the extent to which the request constitutes a morbid and sensational prying into the dead: the more morbid the interest, the greater the privacy interest.

It should be noted that the sixth and final factor was questioned and criticized as a justification for privacy interests of the relatives of the dead in the Space Shuttle Challenger case, where the New York Times had sought the tapes containing the dying words of the crew.[223] Specifically, Judge Harry Edwards writing for a five-person dissent in an en banc review

221. *Invasion of Privacy: Publication of Private Facts*, First Amendment Handbook, http://www.rcfp.org/handbook/c02p03.html (last visited July 15, 2005).

222. Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975).

223. *Supra* notes 49–50 and accompanying text.

(a dissent that included then-future United States Supreme Court Associate Justice Ruth Bader Ginsburg) stated that the fact "[t]hat the appellee's purpose might be *voyeuristic*, and that its arguably *morbid quest* would indeed impinge upon the privacy and enhance the grief of the astronauts' families does not authorize the court to expand upon the privacy protection that Congress ordained."[224]

As noted earlier, these six factors are to be considered in a flexible totality-of-the-circumstances approach. While the factors are flexible in their application, their use by judges and courts should lend some consistency, predictably, and hopefully, coherence to the privacy-of-death jurisprudence that is now growing in the United States.

V. CONCLUSION

The bottom line is that we are a society—including, in that society, the news media—that is fixated on death. We also are a society—including, among that society, of course, legislators and politicians—that is seemingly obsessively concerned with shielding from minors' eyes images of sex on the Internet[225] and representations of violence in video games.[226] As this article has argued, we should be similarly concerned about shielding our eyes—not just those of minors—from images of death when those images potentially exploit and degrade the personal privacy interests of relatives of the deceased.

224. N.Y. Times Co. v. Nat'l Aeronautics & Space Admin., 920 F.2d 1002, 1018 n.10 (D.C. Cir. 1990) (Edwards, J., dissenting) (emphasis added).

225. *See generally* Sue Ann Mota, *Protecting Minors from Sexually Explicit Materials on the Net: COPA Likely Violates the First Amendment According to the Supreme Court*, 7 TUL. J. TECH. & INTELL. PROP. 95 (2005) (describing various legislative efforts to protect minors from sexually explicit materials displayed on the Internet and World Wide Web).

226. *See generally* Clay Calvert & Robert D. Richards, *Mediated Images of Violence and The First Amendment: From Video Games to the Evening News*, 57 ME. L. REV. 91 (2004) (describing and analyzing numerous recent attempts by legislative bodies to regulate minors' access to video games depicting images of violence); Clay Calvert & Robert D. Richards, *The 2003 Legislative Assault on Violent Video Games: Judicial Realities and Regulatory Rhetoric*, 11 VILL. SPORTS & ENT. L.J. 203 (2004) (criticizing, on First Amendment grounds, legislative efforts to limit the access of children to certain video games portraying violence or having violent storylines).